

DUNCAN MACKENZIE

v.

BUREAU OF LAND MANAGEMENT

IBLA 94-871

Decided September 8, 1997

Appeal from a decision of Administrative Law Judge Ramon Child affirming a decision of the Jordan Resource Area Manager, Vale Grazing District, Oregon, Bureau of Land Management, affecting grazing privileges on the Old Mahogany Unit and the Jackies Butte allotment within the Vale Grazing District. OR-030-91-01.

Affirmed.

1. Grazing and Grazing Lands--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

A BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 C.F.R. Part 4100 (1992). The burden is on the objecting party to show by a preponderance of the evidence of record that a decision is in error.

APPEARANCES: Barry Marcus, Esq., Boise, Idaho, for Appellant; W. Hugh O'Riordan, Boise, Idaho, for Intervenor Jackies Butte Grazing Permit Holders; W. Alan Schroeder, Esq., Boise, Idaho, for Intervenor West Cow Creek Allotment Users; Aron D. Yarno, Esq., Eugene, Oregon, for Intervenor Katie Fite; and Barry Stein, Esq., Office of the Solicitor, Pacific Northwest Region, Department of the Interior, Portland, Oregon, for Respondent Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Duncan MacKenzie appeals from a Decision by Administrative Law Judge Ramon Child dated July 28, 1994, affirming an August 27, 1991, Decision of the Jordan Resource Area Manager, Vale Grazing District, Oregon, Bureau of Land Management (BLM). The Jordan Resource Area Manager's Decision denied Appellant's application to transfer 4,285 animal unit months (AUM's) of suspended preference held by Appellant in the Old Mahogany Unit to

the Jackies Butte or West Cow Creek allotments within the Vale Grazing District. This appeal concerns only the application to transfer AUM's to the Jackies Butte allotment.

Briefly, this appeal has the following history. Poor range conditions in the Old Mahogany Unit of the Vale Grazing District No. 3, State of Oregon, coupled with certain assurances made by BLM, led to a 1960 Agreement between the BLM and grazing permittees in the Old Mahogany Unit, including Appellant, to reduce their demand on the Federal range by 42.8 percent (later changed to 33-1/3 percent) of their authorized AUM's within each of their allotments. The 1960 Agreement further provided: "It is further agreed that when an increase in forage production is realized, that restoration of base property qualifications will be made in the same proportion in which the reductions were taken." (Ex. A-1.) Appellant's claimed understanding of the 1960 Agreement was that BLM would increase forage on the Federal range and then restore his suspended preference. (Tr. 88-89.) Appellant testified that without this assurance, he would not have signed the 1960 Agreement. (Tr. 90.)

Following execution of the 1960 Agreement, the Vale Project, funded at more than \$10 million, was implemented by BLM during 1962 to increase forage on Federal range in the Vale District. (Tr. 388.) The majority of this funding was spent in the Southern Malheur Environmental Impact Statement (EIS) area, which includes the Old Mahogany Unit, as well as the Jackies Butte and West Cow Creek allotments. The principle behind the Vale Project was to benefit the entire district, not just parts of it. (Tr. 329.) In order to redress the inequities between allotments like Mahogany which had deficient forage, and those allotments which had increased forage due to BLM improvements, the BLM pursued a policy of shifting use between allotments. Specifically, the policy incorporated planned transfers of use out of Mahogany and into other allotments.

The total suspended preference within the Southern Malheur area resulting from the 1960 Agreement was 23,381 AUM's. (Tr. 190.) The suspended preference in the Vale Grazing District was 22,676 AUM's. (Ex. A-40.) Seventy-three percent of this suspension was suffered by the Old Mahogany Unit. (Tr. 151, 757.) The Old Mahogany Unit has an active preference of 34,848 AUM's and a suspended preference of 16,618 AUM's, 4,285 of which are Appellant's. Conversely, Jackies Butte allotment has an active preference of 14,334 AUM's and no suspended preference. (Ex. A-13.) According to the 1983 Southern Malheur EIS, the Vale Project produced 177,000 additional AUM's. (Ex. A-7, at 17.)

The Old Mahogany Unit was not the principal beneficiary of these improvements, however. The rugged terrain within the Mahogany Unit made significant grazing improvement infeasible, as cattle were prevented by that terrain from utilizing the existing forage. (Tr. 773.) Additionally, increased recreational use, the existence of endangered species, riparian/wetlands areas, wild horses, Big Horn Sheep, extensive wilderness, Areas of Critical Environmental Concern, Research Natural Areas, and a Wild and Scenic River all played a role in limiting grazing potential within Old Mahogany. (Tr. 302-04.)

A plan for implementing BLM's grazing policy and commitments within the Vale District was included in the Allotment Management Plan (AMP or Plan) for Jackies Butte. A 1974 Environmental Assessment (EA) for the Jackies Butte AMP stated that the Plan was designed to increase livestock forage to accommodate present demand and a schedule of livestock shifts from other planning units. (Ex. A-28, at 1.) The EA stated that the Plan proposes construction of three reservoirs (Buckhorn, Crescent, and Hangu), construction of two pits (Jackies Butte No. 1 and Dry Lake Pit), installation of pipelines and extension of the existing China Gulch pipeline water system with 3 miles of additional pipe and three water troughs, as well as the seeding of 10,500 acres. The EA for Jackies Butte states: "Once the depleted areas have been revegetated the additional forage will permit livestock shifts from overobligated allotments enabling improved management and watershed condition in those areas." (Ex. A-28, at 5.)

A 1975 Management Framework Plan recommended transferring qualified livestock use from areas of declining range conditions to allotments where excess forage was available. It also recommended reactivating grazing privileges that were reduced in the past (Class I qualifications) on all allotments by transferring the required amount of qualified livestock use from allotments of deficit forage to allotments having excess forage. (Tr. 221; Ex. A-20, at 1, 2 of 6.)

Although the Jackies Butte allotment had an active preference of 14,334 AUM's, the 1984 Rangeland Planning Summary (RPS) provided for a livestock allocation of 21,611 AUM's if justified by utilization monitoring results. (Ex. A-13, at 15.) The allocation called for in the 1984 RPS was specifically conditioned on the implementation of the grazing system for the Jackies Butte allotment, and the adjustments were to be based on monitoring studies. (Tr. 359-61; Ex. A-13, at 15.)

The BLM regulations create a management framework in which BLM must maintain or suspend forage allocation at levels which will not lead to an unacceptable level of utilization. Allocation levels may not be increased until monitoring data reveals that plant vigor and soil protection can be maintained on an adequate basis. The regulation at 43 C.F.R. § 4110.3-2(b) (1992) provides that: "When monitoring shows active use is causing an unacceptable level or pattern of utilization * * * the authorized officer shall reduce active use if necessary to maintain or improve rangeland productivity * * *." Where active use has been held below that which has been earlier allocated, additional forage must be available before it can be allocated for livestock use. 43 C.F.R. § 4110.3-1 (1992). Moreover, where rangeland has been damaged or forage capacity has been diminished, BLM may not allocate additional forage on a permanent basis for livestock grazing until plant vigor and adequate soil protection is restored. Finally, if it is determined, after adequate monitoring, that a surplus of forage has become available, BLM must first allocate to existing permittees in the allotment who have suspended preferences prior to considering allocation to one who holds no permit for the specific allotment at issue. 43 C.F.R. § 4110.3-1(b) (1992).

Evidence presented by Appellant Duncan MacKenzie's range consultant, Garwin Lorain, indicated that there was a surplus of forage available to support MacKenzie's application. He stated that his analysis of BLM trend data through 1991, coupled with his own studies conducted in 1993, reflected a general upward trend in the Jackies Butte allotment. (Tr. 780-81.)

The BLM's principal witness, Phillip Rumpel, testified using the same data that there was actually a clear downward trend in the Jackies Butte allotment from the late 1970's and early 1980's through 1993. (Tr. 968-70.) Rumpel explained, for example, that a long-term increase in the undesirable sagebrush species for Seed Complex No. 5 indicated a downward, rather than static, trend for this pasture. (Tr. 970.)

Charlene Rogers, range conservationist for the Jackies Butte allotment, similarly disputed Lorain's conclusion, identifying specific problems with the seedings in Jackies Butte, to include dead plants, reduced vigor and the invasion of sagebrush. (Tr. 367-68, 912-13.) The BLM's evidence showed that one reason the trend was down in Jackies Butte was the drought which had occurred from 1986 through 1992 (1993 was not a drought year). In Jackies Butte, the improved conditions of 1993 did not restore the health of the allotment. (Tr. 365, 368-69, 502.) Testimony established that a drought can have long-term impacts on the production capacity of an allotment, and in Jackies Butte in 1993, there was still reduced plant vigor and a loss of plants due to mortality caused by the drought years. (Tr. 365.)

A second factual dispute concerned the availability of adequate water supplies to allow additional livestock grazing in the Jackies Butte allotment. Because of the severe drought, significant cutbacks in grazing use within the Jackies Butte allotment had been imposed in 1991 and 1992. The improved conditions in 1993 allowed Jackies Butte permittees their normal grazing use. MacKenzie argued that Jackies Butte had adequate water sources to sustain additional cattle. His expert, Lorain, testified and presented photographs of reservoirs within the allotment with water during the month of October 1993. (Tr. 583.) Appellant contended that with normal rainfall, Jackies Butte could sustain the additional AUM's represented by his suspended preference.

Rumpel and Rogers both testified on behalf of BLM that the picture presented by Lorain was not accurate. Rogers specifically described how the lack of reliable water sources in Jackies Butte, particularly later in the grazing season, created problems with cattle distribution and with the field rotation required by the grazing system. She explained that the problem even occurred in 1993, which was a better year for precipitation. (Tr. 902, 904, 910-11.) Both witnesses for BLM concluded that current water sources were not adequate to allow for significant additional cattle use in the Jackies Butte allotment, even when normal rainfall occurs. (Tr. 377-79, 912.)

In finding for Respondent BLM, Judge Child determined:

BLM and intervenors established by a preponderance of the evidence that BLM's decision is rationally based upon the fact that, without a better water supply, there is insufficient water and available forage to sustain any additional cattle in the allotment on a permanent basis. As it now stands, there is barely enough water in normal precipitation years, and often too little water in drought years, to sustain the present active preference.

Even if sufficient water did exist, an increase in active use would be inappropriate at this time because the allotment is suffering from the effects of the severe drought from 1986-1992.

The regulations provide for temporary suspension of active use in the event of fire, drought, or other natural causes. 43 CFR 4110.3-2(a). The severe drought led to such temporary reductions in active use in both 1991 and 1992. The normal rainfall in 1993 did not remedy the extensive damage to the allotment, including reductions in plant numbers and vigor, caused by the drought.

(Decision at 6, 7.)

Appellant claims that the July 28, 1994, Decision and the August 27, 1991, Decision issued by the Jordan Resource Area Manager are:

(a) arbitrary and unreasonable; (b) contrary to the law applicable to this case, including regulations of the Department of the Interior; (c) in violation of Appellant's constitutional rights of due process and equal protection; and (d) contrary to the evidence presented in this case.

Appellant claims that the August 27, 1991, Decision of the Jordan Resource Area Manager is not supported by a legally sufficient rational basis, and that the Findings of Fact and Conclusions of Law contained in the July 28, 1994, Decision are erroneous and insufficient to support the Decision.

[1] Implementation of the Taylor Grazing Act of June 24, 1934, as amended, 43 U.S.C. §§ 315, 315a-315r (1994), is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. Klump v. BLM, 124 IBLA 176, 182 (1992); Yardley v. BLM, 123 IBLA 80, 89 (1992); Clyde L. Dorius, 83 IBLA 29 (1984); Ruskin Lines, Jr. v. BLM, 76 IBLA 170 (1983); Claridge v. BLM, 71 IBLA 46 (1983).

Section 2 of the Taylor Grazing Act, with respect to grazing districts on public lands, charges the Secretary to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *." 43 U.S.C. § 315(a) (1994). The Federal Land Policy and Management Act of 1976, amending the Taylor Grazing Act, reemphasizes the Federal commitment to the protection and improvement of Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1994).

Under 43 C.F.R. § 4.478(b), BLM enjoys broad discretion in managing and adjudicating grazing preference. The BLM's adjudication of grazing preference may not be set aside on appeal "if it appears that it is reasonable and that it represents a substantial compliance with the provisions of 43 CFR Part 4100." *Id.* Where grazing preference is adjudicated by BLM, that action may not be regarded as arbitrary, capricious, or inequitable unless it is not supportable "on any rational basis." The burden is on the objecting party to show that a decision is improper. *Klump v. BLM*, 124 IBLA at 182; *Yardley v. BLM*, 123 IBLA at 90; *Glanville Farms, Inc. v. BLM*, 122 IBLA 77, 87 (1992); *Fasselin v. BLM*, 102 IBLA 9, 14 (1988); *Webster v. BLM*, 97 IBLA 1, 4 (1987). The standard of proof applied in grazing cases is the preponderance of evidence test. *BLM v. Cosimati*, 131 IBLA 390, 398 (1995).

We find that Appellant has not shown by a preponderance of the evidence of record that Judge Child's Decision is improper or that the denial of grazing rights in the Jackies Butte allotment to Appellant is not supportable on any rational basis. To the contrary, the record supports that determination. The extended drought in the Vale Grazing District between 1986 and 1992 had left the Jackies Butte allotment incapable of supporting the active preference assigned during 1991 and 1992. In 1993, a normal year for precipitation, range conservationist's testimony established that the allotment would support its active preference but no more. The 1991 determination by BLM, affirmed by Judge Child in his July 28, 1994, Decision, was made at a time when the Jackies Butte allotment could not even support the assigned active preference.

The BLM's determination to restrict use of the Jackies Butte allotment to the current active preference was clearly adopted to prevent overgrazing on existing forage and was taken in recognition of the limited water resources within that particular range. As Judge Child expressly found:

Numerous witnesses established that, without a better water supply, there is insufficient water and available forage to sustain any additional cattle in the allotment (Tr. 361, 370-371, 524-525, 869, 871, 912). Since 1976 there has been insufficient water to sustain active preference in five different years and barely enough water to "sneak by" in most of the other years (Tr. 554).

(Decision at 3.) It is well established that a determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of a showing of error. *Yardley v. BLM*, 123 IBLA at 92; *Briggs v. BLM*, 75 IBLA 301, 302 (1983); *Midland Livestock Co., 10 IBLA 389, 400-401 (1973); David Abel, 2 IBLA 87, 78 Interior Dec. 86 (1971).*

Appellant's testimony at trial, through his expert Lorain, that excess forage and water existed was contradicted by BLM's witnesses Rumpel and

Rogers, and by Jackies Butte rancher Jerry White. (Tr. 1010-32.) Additionally, the increased active preference allocation of AUM's called for in the 1984 RPS was specifically conditioned on the implementation of the grazing system for the Jackies Butte allotment. (Tr. 359-61; Ex. A-13, at 15.) As part of the grazing system, the 1984 RPS called for significant improvements in the allotment. (Ex. A-13, at 24.) The proposed range improvements for Jackies Butte included six reservoirs, a new well, 4 miles of pipeline, and 11,577 acres of brush control. The improvements and the increased allocation of AUM's were directly linked. As stated in the draft EIS for the 1984 RPS, no action in implementing improvements in Jackies Butte would mean that 14,334 AUM's would be available in the allotment, as opposed to over 24,000 AUM's if the preferred alternative were implemented. (Tr. 349-51; Ex. A-8, Table B-1, at 68.)

Testimony from BLM's District Range Conservationist for the Vale Grazing District established that the improvements listed above had not been implemented in Jackies Butte. (Tr. 359; see also Table 3, 1986 RPS Update in Ex. A-14.) Because proposed improvements within the Vale Grazing District were allocated in the 1984 RPS based upon the condition of the allotments at the time of the projection, with those requiring most assistance receiving first priority, Jackies Butte was low on the priority list. The subsequent drought that followed from 1986 through 1992, coupled with the lack of improvements, did not warrant an increased allocation of AUM's in the allotment at the time of Appellant's 1991 application, in the view of BLM. A careful review of the trend studies over time by Rumpel portrayed the Jackies Butte pastures in 1993 for the most part as static to down, with only a few places showing an upward trend. (Tr. 971, 985-88.)

The Decision by BLM, affirmed by Judge Child, was based on existing conditions in the Jackies Butte allotment, and judgments were made on the most recent information, not on past projections. As we said in Miller and Rowlett v. BLM, 118 IBLA 354 (1991):

Using historic grazing levels as a guide, BLM found that none of the canceled preference held by Mosby should be allotted until continuing monitoring of the allotment established their was enough forage available to support such an action.

* * * * *

We conclude, therefore, that the RPS did not require maintenance of the original preference levels allotted, but instead allowed informed decisionmaking, using monitoring studies, as appropriate, to determine proper levels of grazing preference consistent with use and precipitation levels.

Id. at 362-63.

We find that the Decision appealed from, to deny an increase in grazing preference for Appellant, was rational, and that the refusal to vacate

the suspended preference within the Jackies Butte allotment, absent trend data and other monitoring information to support such action, is supported on the record before us.

To the extent not specifically addressed herein, all other errors of fact or law alleged by Appellant have been considered and rejected. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision of the Administrative Law Judge affirming the BLM Decision that denied Appellant allocation of suspended grazing preference rights within the Jackies Butte allotment, is affirmed.

James P. Terry
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge